STATE BAR OF CALIFORNIA
COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Meeting Summary - Open Session

Friday, April 1, 2005
(9:15 am - 12:30 and 1:00 - 5:00 pm)

Saturday, April 2, 2005
(9:00 a.m. - 12:30 and 1:00 - 5:00 p.m)

LA–State Bar Office
1149 South Hill Street
Los Angeles, CA 90015
(213) 765-1000

MEMBERS PRESENT: Harry Sondheim (Chair); Linda Foy; JoElla Julien (by telephone); Robert Kehr; Stanley Lamport; Raul Martinez; Kurt Melchior (San Francisco); Ellen Peck; Hon. Ignazio Ruvolo (San Francisco); Jerry Sapiro; Sean SeLegue; Mark Tuft; Paul Vapnek; and Tony Voogd (San Francisco).

MEMBERS NOT PRESENT: (All members were present for some portion of the meeting.)

ALSO PRESENT: David Bell (Morrison & Foerster, SF, Friday only); Jim Biernat (COPRAC Liaison, SF, Saturday only); Carol Buckner (Western State University); Randall Difuntorum (State Bar staff); Doug Hendricks (Morrison & Foerster, SF, Friday only); Sid Kanazawa (Litigation Section, Friday only); Diane Karpman (Beverly Hills Bar Association Liaison); Louisa Lau (COPRAC Liaison); Meg Lodise (T&E Section, Exec. Committee, Friday only); Joseph Lundy (ALAS); Kevin Mohr (Commission Consultant); Chris Munoz (BASF Liaison, SF, Saturday only); Toby Rothschild (Access to Justice Commission & LACBA Liaison, Friday only); Peter Stern (T&E Section, Exec. Committee, SF, Friday only); Mary Yen (State Bar staff).

I. APPROVAL OF OPEN SESSION ACTION SUMMARY FROM THE NOVEMBER 19, 2004, DECEMBER 10, 2004 & FEBRUARY 4, 2005 MEETINGS

The draft action summary for the February 4, 2005 meeting was deemed approved. At the request of staff, consideration of the November 19, 2004 and December 10, 2004 meeting summaries were postponed.

II. REMARKS OF CHAIR

A. Chair's Report

The Chair welcomed newly appointed members: Robert Kehr and Sean SeLegue. All persons present introduced themselves. The Chair expressed appreciation for the members on-time arrival at the meeting and encouraged members to continue to submit assignments by the assignment deadline and to send e-mail comments as early as possible following consideration of the agenda materials. The Chair solicited input on seeking public comment on a select group of draft rules. It was suggested that the rules in chapter five and chapter seven (ABA format) may soon be ready.

Mr. Tuft provided an oral report on the activities of the ABA Task Force on the Attorney-Client Privilege which held a recent public hearing in Utah.

B. Staff's Report

Staff reported on Assembly Bill 1700 (Pavely) and on resolutions under consideration by the Conference of Delegates of California Bar Associations, including two resolutions concerning government attorney whistle-blowers (Resolution 06-04-04 & Resolution 06-06-05).

III. MATTERS FOR ACTION

A. Report on the Board Referral of Trust and Estates Section Legislative Proposal 2005-02 (re Impaired Clients) [ABA MR 1.14]

Ms. Foy provided an oral report. In particular, it was indicated that the subcommittee wanted authorization to conduct a video-conference meeting to facilitate information gathering from various stakeholders, including representatives of State Bar sections. In response to the request for authorization, the Chair asked staff to work to with the subcommittee to determine availability of Commission resources and the State Bar's video-conference rooms. Ms. Foy also raised a proposed methodology whereby the subcommittee would focus on MR 1.14 and another codrafter team would be assigned to begin consideration of MR 1.6 (RPC 3-100). The studies would run concurrently and then intersect at an appropriate time to address the issue of express exceptions to the duty of confidentiality. However, it was observed that MR 1.14 may also require coordination with other rules, such as RPC 3-310 to the extent that loyalty is implicated.

Mr. Stern and Ms. Lodise briefly addressed the Commission describing the ongoing nature of a possible legislative reform and indicating that the Trust & Estates Section will monitor, and as appropriate contribute to, the subcommittee's work on MR 1.14.

[Intended Hard Page Break]

B. 1. Counterpart to Rule 1-310X [ABA MR 5.1/5.4] re Lawyers Influencing Lawyers

Mr. Tuft presented Draft No. 2 of proposed rule 5.1 (dated March 3, 2005). Mr. Tuft noted that rule 5.1 was adopted in principle at the February 4, 2005 meeting and the proposed comments should be the focus of the Commission's discussion. Mr. Tuft also noted that rule 5.1 was distinct from the regulatory concept of law firm discipline. The Chair asked that the concept of law firm discipline be considered as a separate, future agenda item.

The Chair called for a discussion of the various rule 5.1 issues raised in e-mail messages sent prior to the meeting. Some initial general comments were made including: (1) paragraph (a) of the proposed rule lacked guidance as to what constitutes compliant "reasonable efforts" (i.e., would in-house MCLE training suffice?); (2) discipline should follow from both a lack of measures and an actual violation (by a subordinate) that results from such lack of measures; and (3) ABA Ethics 2000 focused on a rule regulating attorneys possessing managerial authority out of concern that a supervision rule that stated everyone is responsible would likely mean that no one would actually undertake the responsibility of supervision.

Regarding proposed Cmt. [1], the draft was deemed approved with the proviso that the codrafters were authorized to add an introductory comment before or after Cmt. [1].

Regarding proposed Cmt. [2], the draft was approved (10 yes, 2 no, 0 abstain), as amended to include Mr. Sapiro's revision suggested in his March 21, 2005 e-mail message. As amended, the second sentence of Cmt. [2] would read, "Such policies and procedures include, for example, those designed to. . . ."

Regarding proposed Cmt. [3], a recommendation to delete the draft and renumber remaining comments was approved (7 yes, 4 no, 1 abstain).

Regarding proposed Cmt. [4], in response to Mr. Sapiro's concern that the language could be more explicit and comprehensive, the codrafters were asked to reconsider and redraft the comment unless the anticipated new introductory comment resolves Mr. Sapiro's concerns.

Regarding proposed Cmt. [5], the Commission considered clarifying the last sentence by adding the phrase "unless doing so would violate sec. 6068(e)." As an alternative, the phrase "consistent with the lawyer's professional responsibilities to the client." The codrafters were asked to consider both options in preparing a redraft. A straw vote revealed a majority of the Commission members preferred a specific reference to confidentiality rather than a broad reference to professional responsibilities. The Commission also considered and approved a recommendation to delete the third sentence of Cmt. [5] (9 yes, 0 no, 4 abstain).

Regarding proposed Cmt. [6], in response to Mr. Sapiro's recommendation to replace the word "constitutes" with the word "reveals," the codrafters were asked to reconsider and redraft the comment.

Regarding proposed Cmt. [7], there were concerns that the language was overbroad and imprecise in articulating a limitation on supervisor exposure. The codrafters were asked to reconsider and redraft the comment.

Regarding proposed Cmt. [8], the draft was approved by vote (11 yes, 2 no, 0 abstain), as amended to clarify personal v. vicarious responsibility. As amended, it would read,

"Rule 5.1 is not intended to alter the personal duty of each lawyer in a law firm to comply with the Rules of Professional Conduct."

Regarding proposed Cmt. [9], it was explained that this language addresses the concern raised in connection with proposed rule 5.4 about law firm compensation policies and practices that have the effect of unreasonably interfering with a lawyer's professional independent judgment. Some members believed that the comment was appropriate. Other members took the position that the concept was unclear and would foment disputes between subordinates and supervisors. Still others believed that the concept did not relate to proposed rule 5.1 and should be considered separately. The Chair asked the codrafters to reconsider the comment in accordance with the guidance provided by the following straw votes:

Should this concept be in an independent rule? (3 yes, 9 no, 1 abstain)
Should this concept be in a comment? (9 yes, 3 no, 1 abstain)
Should the comment be in rule 5.1? (9 yes, 3 no, 1 abstain)
Should the comment be in rule 5.4? (3 yes, 7 no, 2 abstain)
Should the comment be in rule rule 8.4? (1 yes, 7 no, 4 abstain)

In consideration of all of the foregoing, the codrafters were asked to prepare a redraft.

[Intended Hard Page Break]

B.2. Consideration of Rule 5.2. Responsibilities of a Subordinate Lawyer

Mr. Tuft presented a first draft of proposed rule 5.2 (dated March 3, 2005). Mr. Tuft noted that the rule is just one part of a series of rules in the Model Rules addressing the relationship between supervisors and subordinates. Mr. Tuft also indicated that proposed rule 5.2(b) has been the subject of some criticism and was not unanimously supported by ABA Ethics 2000. As set forth in Mr. Tuft's March 3rd memorandum, the proposed rule included two possible modifications to paragraph (a) of the ABA text: changing the word "acted" to "acts"; and adding the phrase "lawyer or other" before the word "person." A recommendation to implement both modifications was approved (9 yes, 0 no, 0 abstain). Similarly, the Commission agreed that the phrase "is bound by" should be changed to "shall comply with" in order to be consistent with the language of proposed rule 5.1. The Chair then called for a discussion of the various rule 5.1 issues raised in e-mail messages sent prior to the meeting.

Regarding proposed 5.2(b), some members indicated that the provision was an appropriate safe harbor offering a comfort level for subordinate lawyers to follow the direction of supervisors. Other members disagreed on the basis that the provision was unnecessary, promoted abdication by subordinates and it would serve more as an exculpatory standard rather than a disciplinary rule. Some other members noted that issues intended to be addressed by 5.2(b) should be relegated to the comment and not placed in the 5.2 rule text (an alternate approach would be to adapt the entirety of proposed rule 5.2, both (a) and (b), to serve as a comment to rule 5.1). The recent disciplinary case *In the Matter of Maloney* (Rev. Dept. 2005) ___ Cal. State Bar Ct. Rptr. ___ [2005 WL103063] was cited as an example of a situation where both a supervisor and subordinate were found to be culpable as opposed to an allocation of culpability to one but not the other. To address the structure of the proposed rule, it was recommended, and the Commission agreed, that if 5.2(b) is kept in the rule text, then 5.2(a) and 5.2(b) should be combined so that paragraph (b) would be an express exception to paragraph (a) rather than a standalone exculpatory statement. The Commission also agreed that the codrafters should add explicit comment language requiring a subordinate to raise issues of concern with a supervisor as a condition precedent to the safe harbor.

Regarding proposed Cmt. [1], an issue was raised with the language describing the requisite scienter for a violation of the rule. Some members believed that the language would create confusion given California Supreme Court common law defining the concept of "wilfulness" in State Bar disciplinary matters. Other members thought that the term "knowledge" could be changed to "intent." Still other members recommended dodging the issue of scienter by deleting "knowledge" altogether and simply referring to a violation of the rules. On the suggestion to change "knowledge" to "intent," the Commission rejected that approach (1 yes, 10 not, 0 abstain). On the recommendation to replace "whether a lawyer had the knowledge required to render the conduct a violation of the Rules" to "whether the lawyer has violated the rules", the Commission approved the revision (8 yes, 3 no, 0 abstain) and the codrafters were asked to implement the change in the next draft. Also in Cmt. [1], the Commission agreed to: (1) insert the word "necessarily" before the word "relieved" (6 yes, 5 no, 0 abstain); (2) add a cross reference to rule 8.4(a) (7 yes, 3 no, 1 abstain); and (3) replace the word "filed" with the word "signed."

In consideration of all of the foregoing, the codrafters were asked to prepare a redraft.

[Intended Hard Page Break]

C. Consideration of Rule 5.4. Professional Independence of a Lawyer (aka Rule 1-310X)

The Chair summarized the status of proposed rule 5.4, indicating that he joined with other members in objecting to the tentative approval of the rule via a 10-day ballot. This was done in response to a variety of minor issues raised during the ballot. Although there were suggested modifications to address most of the issues, placing the rule back on the agenda was regarded as the best approach. The Chair called for a discussion of these issues.

Regarding proposed new paragraph (f), the Commission approved a recommendation to modify the language to state: “A lawyer shall comply with the Rules and Regulations Pertaining to Lawyer Referral Services as adopted by the Board of Governors” (9 yes, 0 no, 1 abstain). In connection with this vote, it was noted that the LRS rules and regulations are in the process of being revised and there will likely be a new name designated for the LRS rules in the future. It was observed that it might be helpful to footnote the pending LRS revision process in the eventual web posting of the proposed rule 5.4.

Regarding proposed paragraph (b)(2), the Commission approved Mr. Sapiro’s recommendation to move the phrase “to a lawyer's estate or fiduciary representative” to the first clause of the paragraph so that it reads: “Payment to a lawyer's estate or fiduciary representative by a lawyer or law firm of the agreed price for purchasing the law practice of a lawyer who is deceased or who has a conservator or other fiduciary representative, pursuant to the provisions of rule 1.17 [rule 2-300].” (7 yes, 0 no, 3 abstain) In addition, a suggestion was made to delete “by a lawyer or law firm” but this was withdrawn.

Regarding paragraph (a), the Commission agreed (9 yes, 1 no, 1 abstain) to modify the current draft to track the MR 5.4 structure by combining proposed paragraphs (a) and (b) into a single paragraph (a) and leading into the exceptions with the phrase: “This paragraph is not intended to prohibit: . . .” The new paragraph (a) language reads: "A lawyer or law firm shall not share legal fees directly or indirectly with a person who is not a lawyer or an entity that is not authorized to practice law. This paragraph is not intended to prohibit:"

Regarding the Comment, Mr. Sapiro’s recommendation to break-out the second sentence of Cmt. [3] and make it new Cmt. [4] (renumbering the other comments) was deemed approved by consensus. In response to Mr. Sapiro’s suggestion that the rule should clarify application to lay management of government lawyers, it was observed that this issue could be addressed in the Commission’s consideration of a “law firm” definition.

Regarding Mr. Kehr’s observation that paragraphs (b)(1) and (b)(2) are inconsistent because (b)(1) is limited to "money," while (b)(2) is not, by consensus the Commission agreed to modify (b)(1) to read: “The payment of money or other consideration at once or over a reasonable period of time. . . ."

Regarding Mr. Melchior’s Cmt. [7] recommendation to change the word “override” to “govern,” by consensus the Commission authorized the codrafters to revise the Cmt. [7] to cite to *Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1411-12 and to emphasize that insurers and insureds are entirely exempted from this rule's proscriptions. In addition, it was noted that the codrafters should also consider restoring

the third discussion paragraph in existing RPC 1-600 (re public agency provision of legal services).

A redraft was requested in accordance with the foregoing discussion. The Chair indicated that the only open drafting issues were: (1) a Cmt. [7] revision citing to *Gafcon*; and (2) a comment regarding public agency provision of legal services.

[Intended Hard Page Break]

D. Consideration of Rule 3-210 [ABA MR 1.2(d)]. Advising the Violation of Law

Mr. Tuft presented Draft No. 2 of proposed rule 1.2.1 (amended RPC 3-210) (dated March 3, 2005). The Chair indicated that per the agenda the draft is deemed tentatively approved subject to the Commission's resolution of the few issues raised in e-mail messages sent prior to the meeting. The Chair began with a discussion of Mr. Sapiro's comments in his March 21, 2005 memorandum.

Regarding Mr. Sapiro's recommendation that the ABA phrase "shall not counsel . . . or assist" be replaced with the word "advise" (as used in RPC 3-210), it was the consensus of the Commission to retain the ABA language.

Regarding Mr. Sapiro's recommendation to modify version one of the proposed rule text to deal with the juxtaposition of the concepts of "other law" and "court order," the Commission agreed (11 yes, 1 no, 0 abstain) to revise the language to read:

> "A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent or a violation of any law, rule, or ruling of a tribunal, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law, rule or ruling of a tribunal."

Regarding Mr. Sapiro's recommendation to replace the word "honest" with the term "good faith" in the second sentence of Cmt. [1], this revision was deemed approved by consensus. In addition, by consensus, Cmt. [3], Cmt. [4], Cmt. [5] were deleted.

Regarding Mr. Sapiro's recommendation to modify the first sentence of "Alternative Comment [3]," the Commission agreed (11 yes, 0 no, 1 abstain) to modify it as follows: "A lawyer also is required to avoid assisting a client where the lawyer knows that the client's improper course of action has already begun and is continuing."

Also in Cmt. [3], the Commission deemed approved Mr. Sapiro's recommended replacement of the word "suggest" with the word "counsel" in the third line.

The Chair next called for consideration of Mr. Kehr's comments in his March 26, 2005 memorandum. Regarding Mr. Kehr's recommendation to modify the first sentence of "Alternative Comment [3]" to clarify the applicability of the rule to improper client conduct predating the lawyer's representation, by consensus the Commission agreed to make the following change:

> "A lawyer is required to avoid assisting a client where the lawyer knows of the client's improper course of action and whether or not the client's conduct has already begun and is continuing."

The Chair next called for consideration of Mr. Selegue's comments in his March 23, 2005 e-mail message. By consensus, in Cmt. [1], the Commission agreed to use the phrase ". . . fraud or to violate any law rule or ruling of a tribunal." Regarding Mr. Selegue's recommendation to modify Cmt. [6] to address the issue of civil disobedience raised by both Mr. Selegue and Ms. Foy, the Commission authorized the codrafters to implement revisions along the lines of the following:

"In addition, a lawyer may properly advise a client on the consequences of violating a law, rule or ruling of a tribunal the client does not contend is unenforceable or unjust in itself as a means of protesting a law or policy the client finds objectionable. For example, a lawyer may properly advise a client about the consequences of blocking the

entrance to a public building as a means of protesting a law or policy the client believes to be unjust."

The Commission also authorized the codrafters to conform all language in the rule text and the comment to use the phrase “law, rule or ruling of a tribunal.” With these changes, the Commission tentatively approved the draft rule (9 yes, 2 no, 1 abstain) with the understanding that specified revisions would be implemented by the codrafters in accordance with the Commission’s discussion.

[Intended Hard Page Break]

E. Consideration of Rule 3-110 [ABA MR 1.1]. Failing to Act Competently

Mr. Vapnek presented a revised draft of proposed rule 1.1 (amended RPC 3-110) (dated March 9, 2005). The Chair began with a discussion of Mr. Sapiro's recommendation to delete all of Cmt. [3]. There was no consensus to make this change.

The Chair next called for consideration of Mr. Tuft's comments in his March 24, 2005 e-mail message. Mr. Tuft's recommended designation of the rule paragraphs using the ABA format (e.g., (a), (b), etc...) and recommended use of "lawyer" rather than "member" in paragraph (c) was deemed approved.

The Commission determined (6 yes, 3 no, 0 abstain) to use the word "service" (singular noun) in proposed paragraph (b) and to use the word "services" (plural form) in paragraph (c), notwithstanding Mr. Tuft's recommendation to use the word "service" throughout the entire rule.

Prompted by Mr. Tuft's recommendation to make paragraph (c)(3) a comment to the rule, the Commission agreed (7 yes, 3 no, 0 abstain) to revise (c) (3) to read:

> "If a member does not have sufficient learning and skill when the legal services are undertaken, the member may nonetheless provide competent representation by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, 2) by acquiring sufficient learning and skill before performance is required, or 3) referring the matter to another lawyer believed to be competent."

Regarding Mr. Tuft's recommendation to cross-reference rule 5.1 in Cmt. [1], the codrafters indicated that they would consider the cross-reference and revise Cmt. [1]. In addition, the codrafters agreed to consult with Mr. Mohr and consider re-ordering the comments along the lines of Mr. Tuft's suggested order (e.g., start with Cmt. [5], followed by Cmt. [4], Cmt. [1], and Cmt. [2]). The codrafters also agreed to rewrite Cmt. [4] to address "single act" and "mistake" cases that have been considered under RPC 3-110.

The Commission deemed approved the addition of Mr. Tuft's recommended comment addressing diligence as a concept that is, in part, covered by the competence rule.

The Commission agreed (9 yes, 1 no, 0 abstain) with Mr. Tuft's recommendation to add a new comment similar to MR 1.1 Cmt. [4] stating:

> "A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person."

With the understanding that the codrafters were authorized to implement the changes discussed, the Chair indicated that tentative approval of the rule would be sought through a 10-day ballot process.

[Intended Hard Page Break]

F. Consideration of Rule 3-300 [ABA MR 1.8(a)]. Avoiding Interests Adverse to a Client

A revised draft rule was not distributed prior to the meeting. Mr. Lamport summarized the Commission's prior consideration of his September 20, 2004 memorandum outlining rule revision issues.

The Chair called for discussion of Mr. Kehr's March 19, 2005 e-mail message. In response to Mr. Kehr's recommendation that the rule clarify to what extent, if any, a lawyer must explain the lawyer's role in a transaction, the codrafters agreed to account for this issue in the next draft.

Regarding Mr. Kehr's comment on the MR 1.8(a) limitation on required disclosure to only the "essential terms" of an adverse transaction or interest, it was observed that the Commission previously voted to track RPC 3-300 and not MR 1.8(a).

By consensus, the Commission agreed with Mr. Kehr's recommendation that the comment to the rule be amended to clarify that "attempts" to enter into a transaction or acquire an interest are not a violation of the rule.

The Commission asked the codrafters to prepare a draft amended rule in accordance with the discussion.

[Intended Hard Page Break]

G. Consideration of Rule 3-200 [ABA MR 3.1 and 3.2]. Prohibited Objectives of Employment

Mr. Voogd presented a revised draft of proposed rule 3.1 (amended RPC 3-200) dated March 3, 2005. The Chair called for discussion of the issues raised by the codrafters.

The Commission agreed (8 yes, 0 no, 2 abstain) with the codrafter's recommendation to include the phrase "or assert or controvert an issue therein" in the first paragraph of the rule. The Commission also agreed (8 yes, 3 no, 1 abstain) with the codrafter's recommendation to add the word "continue" in the first line so the rule reads: "A lawyer shall not bring, continue or defend a proceeding, or assert or controvert an issue therein. . . ."
Regarding the issue of continuing employment, it was observed that the *Zamos* case demonstrates that bringing a matter may be construed as distinct from continuing a matter.

The Commission agreed (10 yes, 0 no, 0 abstain) with the codrafter's recommendation to include the last line of the proposed rule that is taken from MR 3.1 and is intended to clarify the applicability of the rule to lawyers who defend criminal defendants. The Commission considered but did not adopt a proposal to expand this concept beyond "criminal" matters and to expressly cover loss or suspension of a license. While the Commission did not expand the rule text, it was understood that proposed clarifying language in the comment could be considered. Ms. Peck volunteered to prepare a draft comment on quasi-criminal and loss of license matters for consideration by the codrafters. In addition, Mr. Kehr volunteered to assist the codrafters in considering *Wende* appeal proceedings (see *People v. Wende* (1979) 25 Cal.3d 436) for a possible comment to the rule.

The Commission deemed approved the codrafter's recommendation to include the phrase "in law and fact" in the rule so that it reads: "A lawyer shall not bring, continue or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so . . . ."

The Chair next called for discussion of Mr. Sapiro's comments in his March 22, 2005 e-mail message. The Commission considered but decided not to replace the concept of "probable cause" with the concept of "frivolous." The Commission agreed (7 yes, 2 no, 3 abstain) with Mr. Sapiro's recommendation to restructure the rule to use subparagraphs. In response to Mr. Sapiro's comment on the issue of whether the standard should be frivolous "and" harassing or frivolous "or" harassing, the Commission determined (8 yes, 1 no, 1 abstain) to use the MR 3.1 frivolous concept without the "harassing or maliciously injuring" standard in current rule 3-200.

The Chair next called for consensus votes on the proposed comments. The Commission adopted Cmt. [1] (5 yes, 1 no, 3 abstain); Cmt. [2] (6 yes, 3 no, 1 abstain); and Cmt. [3] (6 yes, 2 no, 2 abstain). Lastly, the Commission also asked the codrafters to include a new comment offering cross-references to: Business & Professions Code § 6068(c) and (g); California Civil Code §§ 128.5, 128.6 and 128.7; and FRCP 11(b) which closely parallels Rule 3.1.

A redraft was requested in accordance with the foregoing discussion.

[Intended Hard Page Break]

H. Consideration of Rule 2-200. Financial Arrangements Among Lawyers

The Chair briefly summarized the background of the Commission's prior consideration of this rule. Mr. Lamport identified issues raised in a January 13, 2005 memorandum from the State Bar Office of the Chief Trial Counsel and in a March 22, 2005 memorandum from Mr. Sapiro. Regarding the OCTC observation that the current RPC 2-200 governs an agreement to divide a fee, the codrafters indicated that the proposed rule would seek to clarify that point. Regarding the OCTC recommendation to track the ABA and require that fee divisions be in proportion to responsibility, it was noted that the Commission had previously determined not to adopt that standard as it would be inconsistent with California public policy as articulated in case law.

The Commission took consensus votes to guide the codrafters in preparing the next draft.

(1) To implement a policy of requiring consent substantially contemporaneous with an agreement to divide fees, the Commission agreed (6 yes, 5 no, 2 abstain) to revise (a)(2) to read:

> "(2) At the time the lawyers enter into the agreement to divide the fee, the client has consented in writing, or the client consents in writing as soon thereafter as reasonably practicable after a full disclosure has been made in writing to the client that a division of fees will be made and the terms of such division;"

Ms. Peck and Mr, Melchior re-affirmed their previously expressed strong dissent to this proposed change in the rule.

(2) A proposal to delete the word "full" in stating the disclosure obligation in (a)(2) failed to garner majority support (4 yes, 8 no, 1 abstain)

(3) A proposal to delete "provision for" in (a)(3) failed to garner majority support (3 yes, 5 no, 4 abstain).

(4) The Commission agreed, by consensus, with Mr. Sapiro's proposal to revise the first sentence of Cmt. [1] to read: "A division of a fee under Paragraph (A) occurs when a lawyer pays to a lawyer who is not in the same law firm a portion of specific fees paid by a client."

(5) The Commission agreed, by consensus, to the format of "paragraph __" when referring to parts of a rule in rule comments.

(6) The Commission agreed, by consensus, to revise Cmt. [1] to read:

> "For a discussion of criteria for determining whether a division of a fee under Paragraph (A) has occurred, see *Chambers v. Kay* (2002) 29 Cal.4th 142; State Bar Formal Opn. No.1994-138."

(7) The Commission agreed, by consensus, to revise Cmt. [2] to read:

> "Paragraph (a) is intended to apply to referral fees in which a lawyer, who does not work on the client's matter, receives a portion of any fee paid to another lawyer who is not in the same law firm."

(8) On the issue of the identity of lawyers who are dividing a fee, the Commission agreed (6 yes, 5 no, 3 abstain) to further revise (a)(2) to read:

"(2) At the time the lawyers enter into the agreement to divide the fee, the client has consented in writing, or the client consents in writing as soon thereafter as reasonably practicable after a full disclosure has been made in writing to the client that a division of fees will be made, the identity of the lawyers who are parties to the division, and the terms of the division;"

(9) The deletion of Cmt. [4] was deemed approved given the revision to (b)(2) of the rule.

(10) The codrafters agreed to consider a possible revision to Cmt. [5] along the lines of the following:

> [5] Paragraph (A)(2) requires . . . in the engagement. ~~These concerns may include~~ This rule allows the client to evaluate 1) whether the client is actually retaining ~~the best~~ a lawyer appropriate for the ~~work~~ matter or whether the lawyer's involvement is based solely on the lawyer's agreement to divide the fee; 2) whether the lawyer dividing the fee will devote sufficient time to the matter in light of the fact that the lawyer will be receiving a reduced fee; and 3) whether the client may prefer to negotiate a more favorable arrangement directly with the lawyer dividing the fee.

(11) The codrafters agreed to consider changing Cmt. [8] to refer to the “total fee” as opposed to merely the “fee” when addressing the requirement that the fee not violate RPC 4-200.

(12) The codrafters agreed to consider changing Cmt. [9] along the lines of the following:

> [9] Rule 2-200 differs from ABA Model Rule 1.5(e) in that it does not require that the division be in proportion to the services performed by each lawyer, that each lawyer assume joint responsibility for the representation, or that the client consent to the participation of the lawyers involved as required in rule 1.5(e)(1) & (2).

A redraft was requested in accordance with the foregoing discussion.

[Intended Hard Page Break]

I. Consideration of Rule 1-300 [ABA MR 5.5] (Unauthorized Practice of Law) (Including consideration of discussion section re "definition of the practice of law")

The Chair called for discussion of that portion of this agenda item concerning proposed rule 5.3. Mr. Mohr presented the background of the proposed rule and the prior votes taken by the Commission. The Commission took consensus votes to guide the codrafters in preparing the next draft.

(1) The Commission agreed (7 yes, 0 no, 2 abstain) to use “lawyer” rather than “member” for this rule.

(2) The Commission agreed (7 yes, 0 no, 2 abstain) to conform proposed rule 5.3(a) to the Commission’s comparable rule language in proposed rule 5.1(a). In addition, for overall consistency the codrafters agreed to rework the rules to have parallel construction.

(3) The Commission agreed (9 yes, 0 no, 0 abstain) to take RPC 1-311 out of the proposed rule and treat it as a standalone rule (numbered 5.3.1).

(4) By consensus, the Commission added the word “confidential” to the third sentence of Cmt. [1].

(5) By consensus, the Commission added the following sentence to Cmt. [3]: “Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.”

(6) The Commission agreed (6 yes, 1 no, 1 abstain) to delete the first sentence of Cmt. [3] addressing paragraph (b) and a lawyer’s supervisory authority over the work of a nonlawyer.

(7) The Commission agreed (6 yes, 1 no, 2 abstain) to delete the comment following Cmt. [3] (“the second Cmt. [3]”) addressing the meaning of the practice of law and cross-referencing rule 5.5.

Lastly, the codrafters agreed to coordinate with Mr. Kehr’s rule 5.7 drafting team on a possible comment addressing nonlawyer provision of ancillary services.

A redraft was requested in accordance with the foregoing discussion.

[Intended Hard Page Break]

J. Consideration of Rule 3-600 [ABA MR 1.13] (Organization as Client)

Matter carried over.

K. Consideration of Rule 2-400. Prohibited Discriminatory Conduct in a Law Practice

Matter carried over.

[Intended Hard Page Break]

L. Consideration of ABA MR 5.7. Responsibilities Regarding Law-Related Services (no California counterpart)

Mr. Kehr presented a March 1, 2005 memorandum addressing MR 5.7 and, in part, recommending adoption of a comparable California rule that is based upon the Florida version of MR 5.7. The new rule would alert lawyers to the California case law applicable to the provision of nonlegal services by lawyers. The Chair called for a general discussion of the codrafters study and recommendation. Among the points raised during the discussion were the following.

(1) Codifying sound case law principles in a proposed new rule may be beneficial but there is a risk that such a rule might duplicate aspects of existing rules and create confusion.

(2) The concept of this rule should be coordinated with work done by the rule 1-720 codrafters who considered the issue of whether ADR services rendered by lawyers is subject to regulation as an "ancillary business."

(3) As drafting points, the codrafters should consider: revising the caption of paragraph (a); using an objective standard (not "might") in paragraph (b); and clarifying paragraph (d) on the particular responsibilities of a fiduciary (see the *Raley* case). Ms. Peck volunteered to share citations with the codrafters on the fiduciary issues.

(4) Regarding "practice of law" issues, it was suggested the codrafters consider the *Baron v. City of Los Angeles* case.

(5) The proposed rule may impact forms of delivery systems used by legal services organizations.

In consideration of the foregoing, the Commission agreed (6 yes, 0 no, 0 abstain) to continue exploring a possible California version of MR 5.7. The codrafters were asked to prepare a proposed draft rule in accordance with the Commission's discussion.

[Intended Hard Page Break]

M. Consideration of Rule 2-300 [ABA MR 1.17] Sale or Purchase of a Law Practice of a Member, Living or Deceased

Matter carried over.

[Intended Hard Page Break]

N. Consideration of Rule 3-310 [ABA MR 1.7, 1.8, 1.9, 1.10, 1.11] Avoiding the Representation of Adverse Interests

The Chair welcomed visitors David Bell and Doug Hendricks from the law firm of Morrison and Foerster. Mr. Selegue presented a March 7, 2005 memorandum identifying factors to consider in beginning the process of amending RPC 3-310 and, in part, recommending that the Commission should use RPC 3-310, rather than the comparable ABA Model Rules, as a baseline for considering amendments. The Chair called for a general discussion. Among the points raised during the discussion were the following.

(1) Rather than diving into a drafting exercise, this topic should be broken into issues and concepts and discussed at that level before proceeding to attempt any wordsmithing.

(2) RPC 3-310 should be the starting because point the ABA conflict rules are very different and California has a wealth of case law and ethics opinions applying RPC 3-310.

(3) The ABA approach takes into account civil issues such as imputed disqualification and there would be a benefit to amending the California rules to have a comparable scope as this might lead courts to rely fully on the California rules and not reach for the ABA rules to cover gaps in RPC 3-310.

(4) The Commission should be careful to maintain California's longstanding orientation toward client autonomy and the ability of a client to consent to a conflict.

(5) There is a fundamental difference between RPC 3-310 and the comparable ABA Model Rules. The former is a disciplinary standard while the latter could be described as an academic restatement.

(6) The California rule has a compliance appeal because is uses a checklist approach that is very accessible to lawyers.

(7) Even if the Commission moves in the direction of the ABA conflicts rules, courts will still generate common law and will still seek out and rely on authorities beyond the RPC's.

(8) The Commission's decision to use the ABA rule numbering system, to a limited extent, dictates some appreciation and adaptation of the structure of the ABA conflicts rules.

(9) Broad concepts in conflicts law transcend rule language and format. Debating concepts and policy is the appropriate starting point.

(10) The existing rule comparison charts should help the codrafters compare and contrast RPC 3-310 with the ABA rules.

(12) Disciplinary rules do not represent the weight of the law in this area. Disqualification cases and liability decisions have a more felt impact.

(13) For interstate law firms, state variations like RPC 3-310 are an obstacle to compliance. Consistency among states in an MJP world would promote compliance. With wide variations, an interstate law firm must try to conform to the perceived strictest rule.

(14) An example of the problem with RPC 3-310 is the absence of (C)(4) and the confusion in the case law concerning (C)(3).

(15) If California made at least some move toward tracking the ABA, then it would increase the possibility that California's policies (i.e., informed written consent) might be followed by other jurisdictions and possibly become a majority rule.

(16) The specific concepts that are important for an interstate practice are: ethical screens, the substantial relationship test; and the delineation between former and current client conflicts.

Following discussion, it was agreed that the codrafters would begin by placing RPC 3-310 into the rule numbering framework of the ABA Model Rules.

[Intended Hard Page Break]

O. Consideration of Rule 3-320 Relationship with Other Party's Lawyer

The Chair called for a brief discussion of this matter. Mr. Mohr provided background. The codrafters indicated that they will suggest an ABA rule number for the rule. The codrafters also indicated that they will substitute “lawyer” for “member” throughout the rule and will consider a recommendation for a “knowledge standard” for the rule. There was no objection to the codrafters’ proposed direction for this rule and draft rule was requested as the next step.

[Intended Hard Page Break]

P. Consideration of Rule 2-100 [ABA MR 4.2] Communication With a Represented Party

Matter carried over.

[Intended Hard Page Break]